Supreme Court, U.S.
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In The

# Supreme Court of the United States

KEITH JOHNSON,

*Petitioner,*

vs.

ORANGE COUNTY, FLORIDA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Florida Fifth District Court Of Appeal**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the requirement of prompt judicial review, imposed by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), entails a prompt judicial determination or a prompt commencement of judicial proceedings.[1]

[1] This is the same question presented in *City of Littleton Colorado v. Z.J. Gifts D-4, L.L.C.*, Case Number 02-1609. Another case raising this issue, also involving Orange County, Florida, is pending before the court, specifically *Clayton Hospitality Group, Inc. v. Orange County, Florida*, Case Number 03-201.

## PARTIES TO THE PROCEEDING

The parties listed in the caption are the only parties to the proceeding, specifically Orange County, Florida and Keith Johnson.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Florida Fifth District Court of Appeal entered in this case. **App. A.**

## OPINIONS BELOW

The decision of the Florida Fifth District Court of Appeal is reported as *Johnson v. County of Orange*, 2004 Fla.App. LEXIS 827 (Fla. 5th DCA 2004), **App. A**. The order of the trial court is unreported and included here as **App. B**.

## STATEMENT OF JURISDICTION

The decision of the Court of Appeal was entered on January 20, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case addresses the First and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

### A. Procedure

Keith Johnson filed a complaint for declaratory judgment and permanent injunction seeking (among other

things) to invalidate Orange County's Adult Entertainment Code for failing to provide "prompt judicial review" as mandated by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). This issue was extensively briefed below. See **App. C**.

The trial court denied Mr. Johnson relief finding that he relinquished his right to adult licenses for his property in a misdemeanor, criminal proceeding. See **App. B**. The trial court's order concludes with a statement that Johnson's requested relief is denied.

On appeal to the Florida Fifth District Court of Appeal, Johnson argued that the case should be remanded on the prompt judicial review issue because the trial court had not issued a ruling on the merits. To the contrary, Orange County argued that the trial judge ruled against Johnson on the merits of the prompt review argument and, therefore, remand was unnecessary.[2]

> Nevertheless, in the event that the constitutional issues were still properly preserved and pending before the trial court, the final judgment encompassed all of the pending issues and properly rejected Johnson's request for relief.

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[2] Ultimately, a remand to the trial court would be fruitless based upon the Eleventh Circuit Court of Appeals' and the Florida Second District Court of Appeal's opinions holding that *FW/PBS* only requires a prompt commencement of judicial proceedings, rather than a decision on the merits. See *Boss Capital v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999) and *P.M. Realty & Inv's, Inc. v. City of Tampa,* 779 So.2d 404 (Fla. 2nd DCA 2000). However, if the Court rules in favor of "Z.J. Gifts," then obviously the trial court would be bound by same.

> In the amended complaint, Johnson raised two constitutional issues. First, Johnson claimed that the licensing provisions failed to provide prompt judicial review. Second, Johnson claimed that the nonconforming use provision was unconstitutional. Either the trial court determined that Johnson did not have standing to assert those constitutional challenges, or the trial court upheld the constitutionality of the provisions at issue.[3]

County's Answer Brief, District Court at p. 17.

On January 20, 2004, the District Court of Appeal entered its per curiam affirmance, **App. A**. This petition followed.

## B. Statement of the Facts

Keith Johnson owns property in Orange County, Florida that has been licensed for adult entertainment purposes for many years. When his tenant vacated the property and closed his adult entertainment business, Johnson reapplied for adult licenses for the properties located at 2201-B and 2207 S. Orange Blossom Trail,

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[3] In other words, in its argument to the court of appeal, the county presented an alternative argument, that either the prompt judicial review argument was not preserved, or it was denied on the merits. At page 34 and 35 of its answer brief, the county argued the issue on the merits citing *Clayton Hospitality Group, Inc. v. Orange County*, 16 Fla.L.Weekly Fed. D200 (M.D. FL 2002), which is pending before this Court, Case Number 03-201, in addition to *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999), *U.S. Nineteen, Inc. v. Orange County*, 8 Fla.L.Weekly Supp. 236 (Fla. 9th Jud. Cir. 2001) [a trial court decision from the same circuit as *Johnson*], and *Florida Video Xpress, Inc. v. Orange County*, 983 F.Supp. 1091 (M.D. FL 1997).

Orange County, Florida. Orange County denied Johnson's request stating that a license was already in effect for the property and that the building department had not approved same. Although not entirely germane to the issue presented here, both of these reasons were invalid – one of which was conceded by the county in the trial proceedings below.[4]

Johnson filed suit claiming that, among other things, Orange County's Adult Entertainment Code (Chapter 3) was unconstitutional because it failed to provide for prompt judicial review on the merits as required by this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). This issue was extensively briefed below and an excerpt from Johnson's pleadings can be found at **App. C**.

Because this Court is currently reviewing *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, Case Number 02-1609, and has another case from Orange County involving the same issue pending, specifically *Clayton Hospitality, Inc. v. Orange County, Florida*, Case Number 03-201, Johnson is asking that the Court accept his case (pending ruling on these cases).

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[4] There was no adult business or licenses in effect at the property because the tenant abandoned and vacated the property. Thus, the reason Johnson applied for new adult entertainment licenses to open a new business.

## REASON FOR GRANTING THE WRIT

### ORANGE COUNTY'S ADULT ENTERTAINMENT CODE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PROVIDE FOR PROMPT JUDICIAL REVIEW ON THE MERITS OR, ALTERNATIVELY STATED, IT CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT IN VIOLATION OF *FW/PBS v. DALLAS*

The Court is well aware that courts across this country are split on the issue of "prompt judicial review," including two from Florida which reached the opposite conclusion advanced by Johnson. See *Boss Capital v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999) and *P.M. Realty & Inv's, Inc. v. City of Tampa*, 779 So.2d 404 (Fla. 2nd DCA 2000). As such, the Court accepted for review *City of Littleton v. Z.J. Gifts D-4*, Case Number 02-1609.

On August 6, 2003, *Clayton Hospitality, Inc. v. Orange County, Florida*, Case Number 03-201, was filed with the Court contending that Orange County's adult code violated the mandate of *FW/PBS*. Presumably the Court is holding *Clayton Hospitality* pending its decision in *Z.J. Gifts*.

Mr. Johnson seeks the same relief as *Clayton Hospitality* and *Z.J. Gifts* and, accordingly, would ask the Court to accept his case pending a ruling in one or both of these cases.

## CONCLUSION

Based upon the foregoing, Johnson requests that this Court grant his petition.

**Respectfully submitted** this 19th day of March, 2004.

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## APPENDIX A

**KEITH JOHNSON, Appellant, v. COUNTY OF ORANGE, FLORIDA AND EARL K. WOOD, TAX COLLECTOR, Appellees.**

**Case No. 5D03-719**

**COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT**

**January 20, 2004, Decision Filed**

**NOTICE**: NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

DECISION WITHOUT PUBLISHED OPINION

**PRIOR HISTORY**: Appeal from the Circuit Court for Orange County, George A. Sprinkel, IV, Judge.

**COUNSEL**: Steven G. Mason of Steven G. Mason, P.A., Orlando, for Appellant.

Linda Brehmer Lanosa of the Orange County Attorney's Office, Orlando, for Appellees.

**JUDGES**: PLEUS, PALMER and TORPY, JJ., concur.

**OPINION**: PER CURIAM.

AFFIRMED.

PLEUS, PALMER and TORPHY, JJ., concur.

## APPENDIX B

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

KEITH JOHNSON,

Plaintiff,

vs.

COUNTY OF ORANGE, FLORIDA, a Political Subdivision of the State of Florida, and EARL K. WOOD, Tax Collector for Orange County, Florida.

Defendants.

_____/

Case No. CIO 99-4179
Division: 35

## FINAL JUDGMENT

THIS ACTION was heard before the Court on the 19th day of November, 2002. Accordingly, the Court found that:

1. Plaintiff, Keith R. E. Johnson, filed an *Amended Complaint* requesting declaratory and injunctive relief regarding applications for two new adult entertainment licenses in the name of Keith Johnson for the properties located at 2201-B and 2207 South Orange Blossom Trail (SOBT), Orlando, Orange County, Florida, for a total of four (4) adult entertainment licenses at the 2200 block of SOBT, which consisted of businesses at the following addresses: 2201-A, 2201-B, 2203 and 2207 SOBT. The *Amended Complaint* did not raise any issue with respect to the two other licensed adult entertainment establishments at 2203 and 2207 SOBT.

2. Keith Johnson's *Amended Complaint* was based upon his two applications for two new adult entertainment licenses that were filed with the Orange County Tax Collector's Occupational License Department, on or about September 29, 1997, and the denial of those applications by the Orange County Tax Collector, through the Occupational License Department, by letters dated October 28, 1997. In addition, the *Amended Complaint* referenced an affidavit that was presented to the Occupational License Department on or about November 25, 1997.

3. This Court considered the plea agreement entered in the related criminal case against Keith Johnson, styled, *State of Florida v. Keith Roland Johnson*, Case No. MO 97-20890/K. The plea agreement was entered on November 25, 1998, in the form of a verbal agreement on the record before the Honorable C. Jeffery Arnold, presiding before the County Court of the Ninth Judicial Circuit in and for Orange County. A true and correct copy of the transcript is attached hereto as **Exhibit 49**. The parties agreed that the transcript contained the plea agreement.

4. This Court has reviewed the transcript and finds that it is clear and unambiguous.

5. The transcript reflected, in pertinent part, that:

> MR. COCCHIARELLA [Assistant State Attorney]: I – and I just have one question about that colloquy we had. When you said you may want to expand, I understand that, but you're giving up two of the licenses. There will only be two licenses; is that correct?
>
> THE DEFENDANT [Keith Johnson]: Right. I won't – there won't be no more private – live private shows there. Hopefully, we can get the County – and, of course, all the paperwork goes

to your office, too, that – where we can expand the uses in there.

MR. COCCHIARELLA: But that would take an application for a new license . . .

THE DEFENDANT: I would think it just. . . .

MR. COCCHIARELLA: . . . for you each use.

MR. NEJAME [Legal Counsel for the Defendant]: Do you understand that you will now have two adult licenses operating out of that property, instead of the former four licenses that operated approximately a year ago? We talked about that. Do you understand that?

THE DEFENDANT: I was just – I would like to make sure I would be able to expand, even if I've got to give it away to the expand – you know, the expansion goes into those two places without me applying for another license as a . . .

MR. COCCHIARELLA: Only the County can agree to that expansion; only the County can.

THE DEFENDANT: Okay.

*Transcript,* pages 11 and 12.

6. In addition, the transcript reflected:

THE COURT: . . . Keith Johnson has told me he understands it. Mr. Nejame, you all – apparently understand it on his behalf. Keith Johnson previously indicated to me that he doesn't read and write as well as he would like to. Have you [Mr. Nejame] – are you satisfied that he [Defendant] understands what the current status of this case is?

MR. NEJAME: I am, sir. Because of those limitations – he is a very intelligent man and intelligent (Indiscernible Word) person; so, yes.

THE COURT: Okay. Good.

All right Keith Johnson . . .

MR. COCCHIARELLA: And I will – the Court's – the Court – at this time, filing a Nol Pros of these – the pending misdemeanors.

THE COURT: As it relates to Keith Roland Johnson?

MR. COCCHIARELLA: Yes, Your Honor.

THE COURT: And that would be in MO97-20890?

MR. COCCHIARELLA: Yes. I am announcing and filing a Nol Pros in MO 97-20890. . . .

*Transcript,* Pages 13-14.

7. Based upon a review of the transcript, this Court finds that in return for the dropping of criminal charges, Keith Johnson previously agreed to give up the two adult entertainment licenses for 2201-B and 2207 SOBT and forever waived his claim and his right to apply or re-apply for adult entertainment licenses for 2201-B and 2207 SOBT.

8. Accordingly, this Court declares that Keith Johnson has no right to the issuance of two new adult entertainment licenses for 2201-B and 2207 SOBT and no right to the relief requested. Therefore,

IT IS ADJUDGED that Plaintiff, Keith Johnson, whose last known address is 3691 SR 580 Unit H, Clearwater, FL 34677, take nothing by this action and that Defendant, ORANGE COUNTY, FLORIDA, a political

subdivision of the State of Florida, located at 201 South Rosalind Avenue, Orlando Florida 32801, and Defendant, EARL K. WOOD, as Orange County Tax Collector, located at 200 South Orange Avenue, Suite 1500, Orlando, Florida 32801, shall go hence without day. This Court reserves jurisdiction to award costs to Defendants.

DONE AND ORDERED at Orlando, Orange County, Florida, this 29th day of January, 2003.

/s/ George A. Sprinkel
George A. Sprinkel IV,
Circuit Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **Steven R. Bechtel, Esquire**, Mateer & Harbert, P.A., 225 E. Robinson Street, Orlando, FL 32801 (Facsimile: 407-423-2016), **Steven G. Mason, Esquire**, 1643 Hillcrest Street, Orlando, FL 32803 (Facsimile: 407-895-2090), and **Luke Charles Lirot**, Luke Charles Lirot, P.A., 112 East Street – Suite B, Tampa, FL 33602 (Facsimile: 813-221-9175), and by hand delivery to: **Linda Brehmer Lanosa**, Assistant County Attorney, Orange County Attorney's Office, Litigation Section, 435 N. Orange Avenue, Suite 300, Orlando, Florida 32801 (Facsimile: (407) 836-2178) this 29th day of January, 2003.

/s/ Linda Brehmer Lanosa
Attorney~~/Judicial Assistant~~

## APPENDIX C

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY,
FLORIDA

**KEITH JOHNSON,**

Plaintiff,

v. CASE NO.: CI99-4179

**COUNTY OF ORANGE, FLORIDA**, a Political Subdivision of the State of Florida, and **EARL K. WOOD**, Tax Collector for Orange County, Florida.

Defendants.

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**MR. JOHNSON'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING LEGAL MEMORANDUM**

**TO: HONORABLE JOSEPH P. BAKER**
**CIRCUIT COURT JUDGE**
**ORANGE COUNTY COURTHOUSE**
**425 NORTH ORANGE AVENUE**
**ORLANDO, FLORIDA 32801**

The Plaintiff, **Keith Johnson**, pursuant to Rule 1.510, Fla.R.Civ.P., states:

### I

### INTRODUCTION

Mr. Johnson has filed a three count complaint seeking a declaratory judgment, injunctive and equitable estoppel

relief. The subject of this lawsuit is two adult entertainment licenses which should be issued for the properties owned by Mr. Johnson located at 2201-B and 2207 South Orange Blossom Trail, Orlando, Orange County, Florida – property that has been used for adult entertainment purposes for many years.

* * *

**THE ORANGE COUNTY ADULT CODE DOES NOT PROVIDE PROMPT JUDICIAL REVIEW WHEN AN APPLICATION FOR AN ADULT ENTERTAINMENT LICENSE IS DENIED OR WHEN THE COUNTY REFUSES TO REPLACE AN EXISTING LICENSE**

Orange County's judicial review provisions appears in Section 3-10 of the Adult Entertainment Code and provides as follows:

> (a) Any decision of the tax collector pursuant to Article II of this chapter may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party.

Under this provision, an aggrieved party must filed a civil complaint in the Orange County Circuit Court. Certiorari, common-law or otherwise, cannot be used because certiorari is only appropriate to review quasi-judicial decisions, and decisions of the Orange County tax collector rendered without notice and hearing are not quasi-judicial. See *Board of County Commissioners v. Casa Development Ltd. II*, 332 So.2d 651 (Fla. 2d DCA 1976). Obviously, there are few time constraints in ordinary civil actions. Unfortunately, some cases can take years to resolve. Section 3-10 of the Adult Code reflects Orange

County's belief that "prompt judicial review" is satisfied by providing prompt judicial "access." As explained below, mere access to the courts is not sufficient to satisfy the United States Supreme Court's "prompt judicial review" requirement in prior restraint cases.

Any law that requires governmental approval, such as a license or permit, before one may engage in any form of "expression" that is protected by the First Amendment is called a "prior restraint." See *Near v. Minnesota*, 283 U.S. 697 (1931). The licensing scheme contained in Article II of the Orange County Adult Entertainment Code is a shining example of a prior restraint. In Orange County one must obtain an adult entertainment license prior to operating a business where exotic dancers perform. Dancing, even nude dancing, is a form of expression protected by the First Amendment. See *California v. LaRue*, 409 U.S. 109, 118 (1972); *Doran v. Salem Inn., Inc.*, 422 U.S. 922, 932 (1975); *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); and *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382 (2000). Therefore, Orange County's adult licensing scheme is unquestionably a "prior restraint."

Although prior restraints are not unconstitutional per se, the the Supreme Court has repeatedly ruled that any system of prior restraints on expression "comes to this Court with a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 372, U.S. 58, 70 (1963); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); and *Vance v. Universal Amusements Co.*, 445 U.S. 308, 315-16

(1980). Because of the danger that protected expression might be suppressed, the Supreme Court has set out certain procedural safeguards that all legislative prior restraints must contain in order to pass constitutional muster. Beginning with *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965), and for twenty-five years thereafter, the Supreme Court has repeatedly ruled that any system of prior restraints must contain three procedural safeguards. First, any restraint imposed prior to a final judicial determination must be for a specified, brief period of time and must be limited to preserving the status quo. Second, prompt judicial review must be available Third, the government must bear both the burden of seeking judicial review and the burden of proof. See, e.g., *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141 (1968); *Blont v. Rizzi*, 400 U.S. 410, 417 (1971); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 367 (1971); and *Southeastern Promotions, Ltd. v. Conrad*, *supra*, at 560. Thus, for twenty-five years after the *Freedman* decision there was no doubt concerning the requirments of laws such as Article II of the Orange County Adult Entertainment Code. Then came *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

*FW/PBS* was a plurality decision written by Justice O'Connor in which only Justice Kennedy joined. Part II of the opinion is the only part that dealt with the prior restraint doctrine, and therefore the only part relevant to this memorandum. Five other justices concurred in Part II, three with reservations that will be explained below. The case involved a Dallas licensing scheme, much like Orange County's, which requried adult-oriented businesses to obtain a license as a prerequisite to operating. Justices O'Connor, Kennedy and concurring Justice Stevens first suggested that one of the three *Freedman*

requirements, i.e., the requirement that the government bear the burden of instituting judicial procedures and carry the burden of proof in court, be eliminated (their reasoning is explained below). The court nonetheless found the Dallas ordinance unconstitutional because it lacked the two remaining *Freedman* safeguards, i.e., a specified brief period in which to grant or deny a license application and prompt judicial review. The court found these two safegaurds to be "essential." Although the plurality failed to offer any enlightenment on the precise meaning of the term "prompt judicial review," Justice O'Connor mentioned the prompt judicial review requirement three times in her opinion. She referred to licenssing laws that regulate protected expression as requring "the possibility of," or "an avenue for," or "availability of" prompt judicial review. 493 U.S. at 228-30. Other than these three references, the pluralilty failed to further define or disucss what they meant by "prompt judicial review." In fact, the Supreme Court has never specifically defined the term, but as explained below, our highest court has always used "prompt judicial review" to mean a prompt judicial "decision."

During the ten years following *FW/PBS*, Justice O'Connor's language has created a split in the federal courts over the meaning of prompt judicial review. The First, Fifth and Eleventh Circuits have all interpreted *FW/PBS* to require that a statute provide only **access** to judicial review.[10] See *Jews for Jesus, Inc. v. MBTA*, 984

[10] A Seventh Circuit case, *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), has also been cited to support the argument that mere "access" satisfies the prompt judicial review requirement, but it is not a

(Continued on following page)

F.2d 1319 (1st Cir. 1993); *TK'S Video, Inc. v. Denton County, Tex.*, 24 F.3d 705 (5th Cir. 1994); and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). The Fourth, Sixth and Ninth Circuits have rejected any modification by *FW/PBS* of the traditional meaning of prompt judicial review and have maintained that a judicial **decision** is necessary to satisfy the requirement. See *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995); *Nightclubs, Inc., v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *11126 Baltimore v. Prince George's County, MD*, 58 F.3d 988 (4th Cir. 1995); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); and *4805 Convoy, Inc. v. San Diego*, 183 F.3d 1108 (9th Cir. 1999)

The South Carolina Supreme Court has likewise aligned itself with those courts finding that prompt judicial review means a prompt decison – not access. *Harkins v. Greenville County*, 553 S.E. 2d 886 (S.C. 2000, U.S. Cert denied, 2000 Lexist 797.

The FLorida Second District Court of Appeal, in analyzing Tampa's code, found that it did not deny prompt judicial review. However, the court found that the various

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proper citation. *Graff* was a pluralilty, *en banc* decision rendered by twelve sharply divided judges. Judge Manion and four others concluded that common law certiorari satisfied the prompt judicial review requirement, although "access" *vis à vis* "decision" was never discussed. The principal opinion was not a majority opinion of the court. The seven judges who either concurred or dissented all indicated their disagreement with Judge Manion's conclusion that availability of judicial review satisfied the prompt judicial review requirement. Accordingly, the *Graff* decison may not be properly cited as holding that the prompt judicial review requirement is satisfied by judicial availability.

constructions of *FWB/PBS* did not have any application in that case. *P.M. Realty and Invesments, Inc. v City of Tampa, Florida*, 779 So.2d 404 (Fla. 2nd DCA 2000).

The specific issue which this court must decide is whether the "prompt judicial review" requirement in prior restraint cases is satisfied by prompt judicial "access" or whether a prompt judicial "decision" is required. As noted above, the Orange County Adult Entertainment Code provides for judicial access only. Since Florida courts are not bound by any of the federal decisions cited above, other than decisions of the United States Supreme Court, *State v. Dwyer*, 332 So.2d 333 (Fla. 1976); *Board of County Commissioners v. Dexterhouse*, 348 So.2d 916 (Fla. 2d DCA 1977); and *Martin v. Board of County Commissioners*, 364 So.2d 449 (Fla. 1978), this Court must look to its own good judgment and United States Supreme Court case law in rendernig its decision.

There are a number of compelling reasons why this court should rule that prompt judicial review is satisfied only by a prompt judicial decision.

First, every prior restraint decision rendered by the United States Supreme Court between *Freedman v. Maryland*, *supra*, and *FW/PBS v. Dallas, supra,* (in other words, between 1965 and 1990), the Supreme Court has used the term "prompt judicial review" to mean a prompt judicial decision. See, e.g., *Teitel Film Corp. v. Cusack*, *supra*, at 141 (striking a Chicago ordinance because it did not contain a provision assuring "a prompt judicial decision on the question of the alleged obscenity of the film"); *Interstate Circuit v. City of Dallas*, *supra*, at 690 n. 22 ("the assurance of a 'prompt final judicial decision' is made here, we think, by the guarantee of a speedy determination by the trial

court"); *Blount v. Rizzi*, *supra*, at 417 (defining prompt judicial review as "a final determination on the merits within a specified, brief period"); *United States v. Thirty-seven photographs*, *supra*, 367-70 (using the term "prompt judicial review" as synonymous with "a prompt judicial review" as synonymous with "a prompt judicial decison"); and *Southeastern Promotions, Ltd. v. Conrad*, 420 *supra*, at 560) in outlining the *Freedman* requirements, the court stated "a prompt final judicial determination must be assured," and holding that where a judicial decision was not obtained for more than five months, prompt judicial review was denied). Importantly, the Supreme Court has never so much as hinted that prompt judicial review means anything less than a prompt judicial decision.

Second, there is just no way that Justice O'Connor's use in *FW/PBS* of the terms "the possibility of," or "an avenue for," or "availability of" prompt judicial review can be properly interpreted to relax the *Freedom* prompt judicial review requirement. There are at least four reasons why this is apparent:

(a) When Justice O'Connor refers to "prompt judicial review," she cites *Freedman*, and there can be no doubt that *Freedman* required that "[a]ny restraint imposed in advance of a *final judicial determination on the merits* must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. at 59 (emphasis added).

(b) Furthermore, in writing that the one *Freedman* requirement should be eliminated, Justice O'Connor stated that the two remaining requirements, i.e., that an ordinance provide for an administrative decision within a

specified brief time and prompt judicial review, were "essential." *FW/PBS*, 493 U.S. at 228.

(c) When she discusses the dangers that licensing schemes pose to protected speech, Justice O'Connor states that the failure of a licensing scheme "to provide for definite limitations on the time within which the licensor must issue the license" renders it invalid because it "contains the same vice as a statute delegating excessive administrative discretion." *Id.* at 226-27. Now why would she condemn a lack of time limitations imposed on a licensor to issue a license and condone a lack of time limitations imposed on a judicial reviewer to render a decision? A lack of time constraints in either case results in the suppression of protected expression. After all, if an applicant's application for an adult license is denied, he will not be issued a license while he seeks judicial review. To require that an application be acted upon within a specified brief time and then place no time restrictions on judicial review simply makes no sense – especially when an application is denied. What good is the one without the other? In fact, Justice O'Connor recognized that the time requirements for an administrative decision and judicial review are actually identical in terms of the effect on an applicant. This is apparent when she states that "[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *Id.* at 228. As the South Carolina Supreme Court ruled a few months ago, prompt judicial review must mean a prompt judicial decision, "[o]therwise, the prompt judicial review requirement loses all significance since the protection afforded by judicial review is meaningful only

when it can be anticipated within a brief time period." *Harkins et al. v. Greenville County*, 553 S.E. 2d 886 (S.C. 2000), U.S. Cert. Denied, 2000 Lexis 797.

(d) Finally, Justice O'Connor never gave any indication that she was altering the *Freedman* prompt judicial requirement. Surely she would have made some explicit reference to the fact that she intended to alter a twenty-five year old decision with the importance of *Freedman v. Maryland* – arguably the most important First Amendment decision in the Court's history. She certainly did not hesitate to announce the demise of the *Freedman* requirement that the government institute judicial proceedings and carry the burden of proof. It makes no sense that she would pussyfoot around with the prompt judicial review requirement. If she had intended to weaken the prompt judicial review requirement, she would have undoubtedly announced that fact without equivocation.

In sum, it is clear that Justice O'Connor was referring to a judicial "decision" within a specified, brief time when she used the term "prompt judicial review." To conclude otherwise is to ignore the obvious.

Third, even if Justice O'Connor's decision could be reasonably interpreted as requiring mere judicial "access," her opinion is not binding on this court because a majority of the justices did not join in her reasoning. Justice O'Connor wrote Part II of the *FW/PBS* decision, i.e., the part dealing with "prior restraint." for herself and Justice Kennedy. Justice Stevens dissented in part but concurred in Part II. Justices Brennan, Marshall and Blackmun concurred but made it clear they believed all three of the *Freedman* safeguards were required. Justice Brennan wrote their concurring opinion in which he stated: " . . . I

believe that our decision two Terms ago in *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 101 L.Ed.2d 669, 108 S.Ct. 2667 (1988), mandates application of all three of the procedural safeguards specified in *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed. 2d 649, 85 S.Ct. 734 (1965), not just two of them . . . " 493 U.S. at 238-39. Chief Justice Rehnquist and Justice White did not join in Part II of the opinion because they believe that the Dallas licensing scheme was a valid time, place and manner restriction which should not be analyzed as a prior restraint. Justice Scalia likewise did not join in Part II of the opinion because he does not believe, as he has stated on more than one occasion, that nude dancing and the sale or rental of sexually explicit materials is protected by the First Amendment, therefore no prior restraint existed.

Accordingly, even if Justice O'Connor's opinion could be interpreted as weakening the "prompt judicial review" component of *Freedman*, *FW/PBS* still does not alter *Freedman*. It is well settled that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976). Clearly, the narrowest grounds on which the justices concurred in *FW/PBS* were that the Dallas licensing scheme constituted a prior restraint and that two of the required safeguards were lacking. These were the only grounds that the concurring justices could agree upon in Part II of the opinion. Six justices agreed on these grounds: Justices O'Connor, Kennedy, Stevens, Brennan,

Marshall and Blackmun. Only three justices could agree on anything else in Part II. So whatever Justice O'Connor intended to do about the *Freedman* prompt judicial review requirement is irrelevant to this Court's decision. The *FW/PBS* decision does not in any manner attenuate the prompt judicial "decision" safeguard mandated by *Freedman* when the government requires a license prior to engaging in protected expression.

Fourth, it simply does not make sense that the United States Supreme Court would make prompt "access" to the courts a requirement in prior restraint situations when we all have prompt access to the courts anyway (unless the Court feared the local governments might enact laws that deliberately and specifically deny prompt access to the courts). Why would the Court make a requirement of something that already exists in the first place?

Judge David R. Thompson of the Ninth Circuit Court of Appeal stated convincingly why providing mere "access" to the court is nonsensical. In *Baby Tam & Co., Inc. v. City of Las Vegas, supra*, Judge Thompson declared:

> We conclude that 'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer.
>
> The phrase 'judicial review' compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms it would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klem once said to an inquisitive catcher: 'it ain't nothin' till I call it.' this is also true of judicial

> review. Until the judicial officer makes the call, it ain't nothin'.

154 F.3d at 1101-02.

The prompt judicial review provided to the plaintiff in the instant case is an excellent example of what Judge Thompson was talking about. So far, the plaintiff has received "nothin'" – nothing that is except an empty building that produces no income, extensive attorneys' fees, and the suppression of rights that are guaranteed by the First Amendment. This case provides a graphic illustration of how the government can deny its citizens First Amendment rights when it is allowed to provide prompt judicial "access" rather than a prompt judicial "decision" in prior restraint situations.

Orange County may argue that it has no authority to provide prompt judicial "access" to the courts, and that only the Florida Legislature and the Florida Supreme Court with its rule-making powers can do so. This argument is correct, but that does not justify the denial of constitutional rights. In *Graff v. City of Chicago*, *supra*, three dissenting judges dealt with the same argument as follows:

> The majority posits the curious argument that Illinois law prevents municipalities from specifying what form of judicial review an administrative decision must receive. Perhaps. But since when does a city gain special dispensation to violate the United States Constitution because a state law contradicts it? Under the Supremacy clause, the state law must give.

The dissent in *Graff* also suggested that a municipality could petition the state legislature for a state-wide

procedural rule that would provide prompt judicial access. The court in *Nightclubs, Inc. v. City of Paducah*, *supra*, made the same suggestion:

> Cities may also petition their state legislatures to pass laws that would obligate state courts to resolve municipal administrative appeals within a reasonably short period of time. *While these measures may seem burdensome at first blush, they are reasonable in light of the great importance this nation attaches to the freedom of expression.*

202 F.2d at 894 (emphasis added).

In fact, some states have already accomplished what the cited opinions suggest. See J. David Guerrera, *Prompt Judicial Review*, 62 Brook L. Rev. 1217 (1996).

The only effective means of avoiding the wrongful suppression of protected expression in the context of adult entertainment licensing schemes is to require a statutorily imposed judicial determination on the merits. The conclusion is inescapable.

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